No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner,
v.
B.E. TILLEY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 4044(d)(1)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1344 (d)(1)(A)) and Section 401(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. § 401(a)(2)), which permit an employer to recoup surplus pension plan assets at plan termination after satisfaction of all "liabilities," preclude such a reversion:

(a) when the surplus remaining after plan termination and the satisfaction of all liabilities was not the result of an actuary's "computational error," and

(b) when fully subsidized early retirement benefits were not paid to participants who failed to satisfy the age and service requirements under the plan for such benefits.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, The Mead Corporation, and the respondents, B.E. Tilley, William L. Crotts, Chrisley H. Reed, J.C. Weddle, and William D. Goode. In addition, the Court of Appeals listed David H. Wall as a plaintiff-appellant in the caption to its decision. Mr. Wall, however, died on June 6, 1985, while this action was still pending before the district court. No attempt was made to substitute Mr. Wall's executor as a party until this case was pending before this Court in 1988, and this Court denied respondents' motion for substitution. 488 U.S. 906 (1988). No subsequent motion for substitution has been made, and in the body of its opinion, the court of appeals recognized that only five plaintiffs remained. App. 3a n.1.

Pursuant to Supreme Court Rule 29.1, the following list identifies all parent companies, subsidiaries (other than wholly-owned subsidiaries), and affiliates of petitioner, The Mead Corporation:

1. Aviocart S.P.A.
2. B.C. Chemicals Company
3. B.C. Chemicals Ltd.
4. Folio Corporation
5. Harima M.I.D., Inc.
6. International Fibre Sales, S.A.
7. Mead Emballage, SA
8. Mead Europe Engineering, SARL
9. Mead Packaging Ppty. Ltd.
10. Mead-Toppan Company Ltd.
11. Noranda Panelboard, Inc.
12. Northwood Forest Industries, Ltd.
13. Northwood Properties Limited
14. Northwood Pulp & Timber, Ltd.
15. Star Data Systems, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Mead Corporation ("Mead") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-32a) on remand from the decision of this Court (App. 33a-47a) is reported at 927 F.2d 756. The court of appeals' initial decision (App. 48a-54a) is reported at 815 F.2d 989. The memorandum opinion of the district court (App. 55a-60a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1991. A timely petition for rehearing with a suggestion for rehearing en banc was denied by the court of appeals in a 6-5 vote on June 5, 1991, with

Judges Russell, Chapman, Wilkinson, Wilkins, and Niemeyer voting in favor of rehearing. App. 62a-63a.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent sections of the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1344), the Internal Revenue Code of 1986 (the "Code") (26 U.S.C. § 401(a)(2)), and the Internal Revenue Service regulations (Treas. Reg. § 1.401-2(b)), are set forth in the Appendix. App. 69a-74a.

STATEMENT

This petition presents a question that this Court characterized in its previous opinion in this case as "complicated and important," with a direct impact on "the private pensions of millions of workers" (App. 44a n.11) —namely, whether unearned, subsidized early retirement benefits are "liabilities" under ERISA and the Code that must be satisfied upon termination of a pension plan. In reversing the court of appeals' first decision in this case, this Court determined that respondents could not claim entitlement to these benefits under ERISA § 4044(a)(6), which the Court held was only an allocation mechanism. App. 43a.[2] Noting that "[t]he Plan did not provide for any benefits payable solely upon plan termination" (App. 36a), this Court nevertheless was reluctant to rule on the

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[1] The court of appeals initially issued an order denying rehearing and rehearing en banc and indicating that no member of the court or panel had requested a vote on Mead's suggestion for rehearing en banc. App. 64a-64a. This order was filed on May 28, 1991, but was withdrawn on May 30, 1991. App. 68a.

[2] For convenience, Title IV of ERISA, as amended, is referred to by citation to ERISA, without parallel citations to Title 29 of the U.S. Code. Similarly, the Internal Revenue Code is referred to without parallel citation to Title 26 of the U.S. Code.

remaining two questions briefed by the parties without the views of the Pension Benefit Guaranty Corporation ("PBGC") and the Internal Revenue Service ("IRS"), the agencies responsible for administering ERISA and the Code. App. 44a n.11. Accordingly, the Court remanded for consideration of two alternative grounds for recovery of unearned early retirement subsidies: (1) whether such benefits are "accrued benefits" under ERISA, and (2) whether they are "liabilities" within the meaning of ERISA § 4044(d)(1)(A) that must be paid on plan termination. App. 48a.

On remand the IRS and the PBGC each informed the court of appeals that the benefits at issue here were neither "accrued benefits" nor "liabilities" of the plan. The court of appeals unanimously ruled that unearned early retirement subsidies were not accrued benefits under ERISA. App. 6a-9a. In a sharply divided decision, however, the court below held that unearned early retirement subsidies were liabilities that Mead was required to pay on plan termination. App. 12a. In its opinion the court of appeals merely acknowledged that it had received the views of the PBGC and completely ignored those of the IRS.

1. Beginning in 1938 the Internal Revenue Code ("Code") has required pension plans to include certain provisions in order to be "tax-qualified" and receive tax exempt status. The first such provision prevents diversion of pension plan assets—at plan termination or any other time—for any purpose other than for the exclusive benefit of participating employees. Code § 401(a)(2). To satisfy this non-diversion requirement, the terms of the plan must make it "impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries . . . for any part of the corpus or income to be . . . used for, or diverted to, purposes other than the exclusive benefit of [the] employees or their beneficiaries." *Id.*

Congress not only left this non-diversion requirement of the Code undisturbed when it enacted ERISA in 1974, but actually incorporated it into Title IV of ERISA by requiring that all "liabilities" of the plan be satisfied before any surplus plan assets can revert to the employer. ERISA § 4044(d)(1). Title IV also establishes a plan termination insurance program "to protect employees against the loss of 'nonforfeitable' benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 n.1 (1980). Finally, Title IV creates the PBGC to oversee plan terminations, and establishes a mandatory six-category allocation scheme for the distribution of assets upon plan termination. ERISA § 4044; *see* App. 35a n.2.

The "benefit liabilities" that a plan must pay on termination under Title IV of ERISA are, by definition, the same "liabilities" covered by § 401(a)(2) of the Code. *See* ERISA §§ 4001(a)(16), 4041(b)(1)(D). While the Code itself does not further define the term, agency interpretations delineate two requirements that must be met before "liabilities" are deemed satisfied. First, an IRS regulation explains that the requirement that "liabilities" be satisfied at termination is intended "to permit the employer . . . to recover at the termination of the trust . . . any balance remaining in the trust which is due to erroneous actuarial computations." Treas. Reg. § 1.401-2(b)(1). The phrase "erroneous actuarial computations" is defined in the regulation to mean "the surplus arising because actual requirements differ from expected requirements" (*id.*), which in turn means simply any funds remaining in the plan after satisfaction of all liabilities. *See* Rev. Rul. 83-52, 1983-1 C.B. 87 (reprinted at App. 74a-76a). Second the IRS regulation goes on to specify that the term "liabilities" includes both "fixed" and "contingent" liabilities. Treas. Reg. § 1.401-2(b)(2). In a series of revenue rulings, the IRS has defined "contingent liabilities" as the "benefit credits accrued up to the time

of termination." *E.g.*, Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69.[3]

2. The five respondents were salaried employees at the Lynchburg Foundry Company (the "Foundry") while it was a wholly-owned subsidiary of Mead. App. 3a, 36a. Each respondent participated in Mead's Industrial Products Salaried Retirement Plan (the "Plan"), a tax-qualified, defined benefit pension plan funded entirely by Mead. App., 3a, 36a.

In 1983 Mead sold the Foundry and, exercising a right it had expressly reserved (App. 119a (Plan, Art. XIII, § 4(a)), terminated the Plan. App. 37a. Pursuant to the terms of the Plan, participants earned a normal retirement benefit, payable at age 65 and calculated by reference to their earnings and years of service with Mead. App. 36a; App. 93a (Plan, Art. V, § 1). At termination of the Plan, participants who were age 55 or older were paid this age 65 benefit, reduced in accordance with the Plan's terms by 5 percent for each year that they were under age 65; those age 62 or older with 30 or more years of service were paid a fully subsidized early retirement benefit—*i.e.*, a benefit equal in amount to the benefit otherwise payable at age 65; and those ineligible for either of these early retirement benefits were paid only the earned—*i.e.*, "accrued"—portion of their age 65 normal retirement benefit. App. 36a-37a; App. 49a-50a. Respondents were all between 55 and 62 and thus fell into the first group. Pursuant to their elections, respondents were paid their reduced early retirement benefits in lump sums. App. 37a n.6.

Mead sought approval of the Plan termination from both the PBGC and the Internal Revenue Service ("IRS").

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[3] *Accord*, Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274 (same); Rev. Rul. 57-163, pt. 3(d), 1957-1 C.B. 128, 138 (same); Rev. Rul. 61-157, pt. 3(d), 1961-2 C.B. 67, 79 (same); Rev. Rul. 65-178, pt. 3(d), 1965-2 C.B. 94, 110 (same); *see also* Treas. Reg. § 1.401-2(b)(2). The same result obtains under PBGC regulations. *See infra* n.7, p. 22.

App. 37a n.5. In November 1983 the PBGC issued a "notice of sufficiency," ruling that, based on Mead's planned distributions, all liabilities under the Plan had been satisfied. App. 157a-158a; *see* App. 37a n.5. The IRS subsequently issued a favorable "determination letter," similarly ruling that all liabilities to Plan participants had been satisfied. App. 159a-160a; *see* App. 37a n.5.

After the Plan assets were distributed to participants in the manner approved by the PBGC and the IRS, nearly $11 million remained. Under the terms of the Plan:

> Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan . . . , and after distribution of any released reserves . . . shall, subject to the pertinent provisions of federal or state law, be returnable to [Mead].

App. 122a (Art. XIII, § 4(f)); *see* ERISA § 4044(d)(1)(A); Code § 401(a)(2); Treas. Reg. § 1.401-2(b). Accordingly, Mead took a reversion of the entire surplus. App. 37a.

3. In June 1984, however, respondents filed suit against Mead in state court, alleging, *inter alia*, that Mead's taking of the reversion without paying them unreduced early retirement benefits violated ERISA. App. 38a. Mead removed the suit to federal district court. App. 38a.

On cross-motions for summary judgment, the district court ruled in Mead's favor, holding that "early retirement benefits are not 'accrued benefits' under ERISA," and that "reaching age 62 and having thirty years of Credited Service [are] conditions which must be met before a participant [can] be said to possess even a contingent benefit of early retirement." App. 56a-57a. In addition, the district court held that, under ERISA § 4044(d)(1), the surplus properly reverted to Mead since "[a]pplying the broad IRS definition [of actuarial error] in this case . . . the surplus did in fact arise from actuarial error." App. 59a (footnote omitted).

On appeal the court of appeals reversed and remanded. App. 48a-54a. Under that court's initial view, Mead was obliged under ERISA § 4044(a)(6), which requires payment of "all other benefits under the plan," to pay early retirement subsidies "even if those benefits were not accrued at the time of [plan] termination." App. 52a.[4]

This Court reversed and remanded. App. 33a-47a. The Court rejected the court of appeals' construction of ERISA § 4044(a)(6), holding that "the language of § 4044(a)(6)—'benefits *under the plan*'—can refer only to the allocation of benefits provided by the terms of the terminated plan." App. 40a (emphasis in original). Since respondents had failed to satisfy the Plan's age and service requirements for receipt of an unreduced early retirement benefit, they had not earned a "benefit under the plan." App. 39a-40a.

The Court noted, however, the "two alternative grounds" respondents offered "for concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer." App. 43a; *see supra* pp. 2-3. In remanding the case "for a determination whether respondents are entitled to damages on the basis of either of these alternative theories," this Court noted that neither the PBGC nor the IRS had briefed these questions, and specifically directed the court of appeals on remand to "consider the views" of both agencies, App. 43a-44a & n.11. As the Court observed, "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" App. 43a-44a (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)).

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[4] Within three weeks of the court of appeals' first decision in favor of respondents, their counsel filed a follow-on class action seeking early retirement subsidies for other participants in the Mead Plan without regard to whether they had satisfied the Plan's age and years of service requirements for receipt of those benefits. *See Linkous v. Mead Corp.*, No. 87-C165-R (W.D. Va. filed Apr. 24, 1987). That suit is still pending.

Justice Stevens dissented. App. 45a-47a. He agreed with the majority's construction of ERISA § 4044(a)(6). App. 45a. In his view, however, Article XIII, § 4(f) of the Plan, ERISA § 4044(d)(1)(A), the "parallel provision" of the Code—*i.e.*, Code § 401(a)(2)—and the regulatory definition of "liabilities" in Treas. Reg. § 1.401-2(b)(2), required that unreduced early retirement benefits be paid to the respondents who had satisfied the Plan's 30 years of service requirement, but not until they also had satisfied the age 62 requirement. App. 45a-46a.

4. On remand the parties briefed the two statutory issues identified by this Court. Although the court of appeals did not invite the agencies to participate, the views of the PBGC and the IRS were presented on remand, as this Court had instructed. The PBGC filed a brief and participated in the oral argument, stating its view that "[u]nearned subsidized early retirement benefits are not among the liabilities included in Section 4044(d)(1)(A) that must be paid before residual assets revert to the employer." PBGC Br. on Remand at 4. The IRS participated by way of a letter from the Tax Division of the Department of Justice, which confirmed "the position of the Internal Revenue Service that . . . early retirement benefits [a]re not plan liabilities within the meaning of Section 401(a)(2) of the Code." App. 168a.[5]

Notwithstanding these agency positions, on remand a divided panel of the court of appeals ruled once again that Mead must pay unreduced early retirement benefits, even though the Plan's age and service requirements for receipt of those benefits have not been satisfied. App. 9a-16a. After unanimously ruling that unreduced early retirement benefits are not "accrued benefits" under ERISA (App. 6a-9a), the court of appeals turned to the "liabilities" issue and ruled that the reversion provision of the

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[5] Under ERISA § 4002(b)(1), the PBGC has independent litigating authority. The Department of Justice letter required the approval of the Solicitor General. *See* 28 C.F.R. §§ 0.20(b), (c).

Plan, when construed in light of IRS regulations and as enforced by ERISA, required payment of unreduced early retirement benefits. App. 11a-16a.

In reaching this conclusion, the court of appeals reiled on its own peculiar understanding of two critical phrases in the Plan's reversion provision: "actuarial error" and "contingent rights accrued under the plan." App. 12a-15a. "Actuarial error," in the Court's view, "seems to reference computational error resulting from inaccurate statistical assumptions." App. 12a. "Contingent rights accrued," in the view of the court below, seemed to refer to benefits that respondents had expected to earn at some point in the future under the terms of the Plan. App. 13a-14a. Since it found no evidence of computational error in this case, and since the early retirement benefits at issue might have been earned had the Plan not terminated, the court of appeals held that a reversion could not properly occur without payment of unreduced early retirement benefits. App. 12a.

Judge Chapman dissented. App. 16a-32a. He criticized the majority for evading the mandate of this Court, for analyzing the Plan "in a vacuum," and for ignoring the "ample meaning" that both "actuarial error" and "contingent rights accrued" have "under both ERISA and the Code." App. 30a-31a. Judge Chapman first pointed out that subsection (1) of Treas. Reg. § 1.401-2(b) defines "liabilities" with reference to "erroneous actuarial computations." App. 30a. Embracing the IRS's view that " 'erroneous actuarial computations' is simply short-hand for what is left over after all vested and contingent obligations . . . are satisfied," Judge Chapman concluded that the surplus in the Plan was attributable to "erroneous actuarial computations" and therefore could properly revert to Mead. App. 24a, 30a. Second, Judge Chapman noted that subsection (2) of the regulation, along with IRS revenue rulings on the subject, made it clear that "contingent liabilities" are only those " 'benefit cred-

its *accrued* up to the time of termination of the trust.' " App. 21a (emphasis in original; quoting Rev. Rul. 53-33, 1953-1 C.B. 267, 273). Accordingly, Judge Chapman concluded that the term " 'liabilities' under the Code and ERISA does not include unaccrued benefits such as unreduced early retirement benefits." App. 22a.

5. On March 12, 1991, Mead filed a timely petition for rehearing with a suggestion for rehearing en banc. The PBGC, and the American Academy of Actuaries ("AAA") and the American Society of Pension Actuaries ("ASPA"), filed amicus briefs in support of Mead's petition. In its brief the PBGC reiterated its position that unreduced early retirement benefits are not "liabilities" of the plan, and noted that the panel majority's "construction of terms of art used in the Plan does violence to the established meaning of those terms under the Code and ERISA." PBGC Br. In Support of Rehearing at 8, 11 (reprinted at App. 186a-187a, 189a). Similarly, in their joint brief, AAA and ASPA noted that "virtually all pension plans" incorporate the pension law concepts construed by the panel majority, and concluded that "the majority has again called into question the correct calculation of the benefits paid and the reversions permitted from thousands of plans containing early retirement subsidies." AAA/ASPA Br. In Support of Rehearing at 9, 13. In a 6-5 vote, the court of appeals denied Mead's petition on June 5, 1991, with Judges Russell, Chapman, Wilkinson, Wilkins, and Niemeyer voting in favor of rehearing en banc, and Chief Judge Ervin, along with Judges Widener, Hall, Phillips, Sprouse, and Murnaghan, voting against. App. 62a-63a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CREATES A DIRECT CONFLICT OVER THE PROPER CONSTRUCTION OF CRUCIAL PENSION LAW PROVISIONS INCORPORATED IN VIRTUALLY EVERY PENSION PLAN NATIONWIDE

As this Court recognized in its earlier decision, this case presents "complicated and important issues pertaining to the private pensions of millions of workers." App. 44a n.11. The Court specifically instructed the court of appeals to consider the views of the responsible administrative agencies. The court of appeals was presented directly with the agencies' views, but disregarded them. Instead, the court of appeals developed its own idiosyncratic construction of crucial federal pension law terms that are included in virtually all pension plans nationwide.

The court of appeals reached this result by purporting, at least in part, to avoid the issues that concerned this Court and instead to decide the case on a different ground —one neither presented by the remand order nor briefed by the parties. This new ground supposedly rests on the particular language of the Mead Plan, but that in fact is not and indeed cannot be the case. Because the only portions of the Mead Plan relied on by the court below directly incorporate common federal pension law provisions, construction of those terms necessarily involves interpretations of federal law—a fact that the court of appeals itself acknowledged. When confronted with virtually identical plan language, other courts of appeals have similarly acknowledged the issue as one of federal law, but, in contrast to the court below, have engaged in standard statutory analysis—consulting the text of ERISA and the Code, the legislative history of the relevant provisions, and the views of the PBGC and IRS—to arrive at the proper construction.

The interpretations of federal pension law embodied in the decision below conflict with the views of the responsible administrative agencies, the holdings of other courts of appeals, and the established understanding of those terms within the pension community. As the court of appeals acknowledged, the longstanding practice of the PBGC, the IRS, and the leading associations of pension actuaries is "*not* to treat unreduced early retirement benefits as liabilities that must be satisfied prior to asset reversion." App. 10a (emphasis in original). Nevertheless, the court of appeals reached precisely the opposite conclusion and ruled that Mead must pay such benefits. This holding has a significant impact; as the PBGC warned in urging rehearing below, the court of appeals has adopted a "construction of terms of art used in the Plan [that] does violence to the established meaning of those terms under the Code and ERISA." PBGC Br. In Support of Rehearing at 11 (App. 189a).

The conflicts created by the decision below cannot be allowed to stand. The court of appeals' decision calls thousands of prior plan terminations into question and erects a barrier to the reversion of surplus pension plan assets that undermines the policy of ERISA § 4044 (d)(1), which specifically allows reversion of surplus assets to employers.

Until and unless the decision below is reversed, it will stand as an invitation to participants to attack prior plan terminations in the hope of being paid benefits they had "expected" to receive but for which they had never satisfied specific plan requirements. Moreover, in addition to seeking recovery from employers who received distributions of surplus assets after getting approvals from the IRS and the PBGC, plan participants will be able to sue the PBGC under ERISA § 4003(f) for having "adversely affected" them by approving such reversions. To protect against a flood of litigation seeking to force the repayment of billions of dollars in reverted plan assets or pos-

sibly to impose additional liabilities on the PBGC, this Court should grant the petition and resolve the conflicts created by the decision below.

1. The Decision Below Rests On An Incorrect Construction Of Key Provisions Of Federal Pension Law

ERISA and the Code do not require employers to establish pension plans. If an employer chooses to do so, however, the Code requires that the plan contain specified provisions in order to receive favorable tax treatment. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510-14 (1981). As a result, tax-qualified pension plans are drafted carefully to comply with the various requirements of the Code. The Mead Plan, for example, is expressly drafted to be consistent with "Section 401 of the Internal Revenue Code [and] . . . any other provisions of law or the rules and regulations of [the IRS] . . . with respect to [tax] qualification of the Plan." App. 125a (Plan, Art. XV, § 4). Indeed, under the Plan any provision deemed inconsistent with the Code or IRS regulations is to be "disregarded" and deemed "null and void." App. 125a (Plan, Art. XV, § 4).

Since at least 1953 the IRS has mandated that each plan "be a definite written program setting forth all provisions essential to qualification." Rev. Rul. 53-33, pt. 2(f), 1953-1 C.B. 267, 271. To do so, tax-qualified pension plans, such as the Mead Plan, incorporate the requirements imposed by ERISA and the Code as specific plan provisions.

Article XIII, § 4 of the Mead Plan—the section relied on by the court of appeals—is just such a provision. As required by the IRS, this section of the Plan incorporates and restates requirements imposed by ERISA § 4044 and Code § 401 and the relevant regulations under them.

For example, IRS regulations specify that a qualified plan must reflect a commitment to "a permanent as distinguished from a temporary program." Treas. Reg.

§ 1.401-1(b)(2); *see also* Rev. Rul. 69-421, pt. 2(h), 1969-2 C.B. 59, 63 (noting permanency requirement). This same regulation notes, however, that "the employer may reserve the right to change or terminate the plan." Treas. Reg. § 1.401-1(b)(2). Mead has explicitly incorporated these requirements into the Plan: subsection 4(a) of Article XIII expresses Mead's intent "to maintain th[e] Plan in force indefinitely," while "reserv[ing] the right to amend or discontinue the Plan." App. 119a (Plan, Art. XIII, § 4(a)).

Similarly, subsections 4(c) and 4(d) of Article XIII of the Plan directly incorporate the requirements of ERISA § 4044. As this Court recognized in its previous decision (App. 39a-43a), § 4044(a) sets forth an "allocation scheme" for voluntary plan terminations. Subsection 4(c) of Article XIII of the Mead Plan does the same thing. *Compare* ERISA § 4044(a)(1)-(6), *with* App. 119a-121a (Plan, Art. XIII, § 4(c)(i)-(v)). ERISA § 4044(b) provides several specific rules to guide the allocation of assets among the categories listed in § 4044(a); subsection 4(d) of Article XIII of the Mead Plan restates these statutory requirements as guides for making allocations under subsection 4(c). *Compare* ERISA § 4044(b)(1)-(2), *with* App. 121a (Plan, Art. XIII, § 4(d)(i)-(ii)).

Subsection 4(f) of Article XIII of the Plan, which the court of appeals purported to construe, operates in the same way; it restates ERISA and Code requirements with respect to non-diversion of plan assets. Specifically, ERISA § 4044(d)(1)(A) prohibits any distribution of surplus assets until after "all liabilities of the plan to participants and their beneficiaries have been satisfied." Similarly, under Code § 401(a)(2), the terms of a plan must make it "impossible, at any time prior to the satisfaction of all liabilities" for plan assets to be "used for, or diverted to, purposes other than for the exclusive benefit of [the] employees or their beneficiaries." Code § 401

(a)(2). The IRS has explained that "the intent and purpose" of this non-diversion requirement "is to permit the employer to reserve the right to recover at the termination of the trust . . . any balance remaining in the trust which is due to erroneous actuarial computations." Treas. Reg. § 1.401-2(b)(1). In addition, the IRS has defined "liabilities" to include both "fixed liabilities"—*i.e.*, "the amounts required to provide the benefits payable to those who have become entitled to them"—and "contingent liabilities"—*i.e.*, "the benefit credits accrued up to the time of termination of the trust for employees (and their beneficiaries) who might have become entitled to benefits if the trust had been continued indefinitely." Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69; *see also supra* n.3.

Subsection 4(f) of Article XIII of the Mead Plan incorporates these regulatory provisions by mandating that any Plan surplus be attributable to "actuarial error" before it can revert to Mead, and by requiring that "benefit rights or contingent rights accrued under the Plan" be satisfied. App. 122a (Plan, Art. XIII, § 4(f)). The dissent below pointed out (App. 30a) that by including the "actuarial error" limitation on reversions, the Plan drafters were merely recognizing that the Code and applicable IRS regulations only permit reversion of a surplus caused by "erroneous actuarial computations," and writing that concept into the Plan. As the PBGC told the court of appeals, "[i]t is simply inconceivable that the drafters of the Mead Plan intended by that term anything other than the meaning attached to it by the IRS." PBGC Br. In Support of Rehearing 10 (footnote omitted) (App. 189a); *see also* Rev. Rul. 85-6, 1985-1 C.B. 133, 134 (using "actuarial error" phrasing); App. 30a (Chapman, J., dissenting) (noting IRS's "interchangeable use" of "erroneous actuarial computations" and "actuarial error").

Similarly, as even the court below acknowledged (App. 14a), the "contingent rights accrued" language was

"written in light of the regulation" that compels satisfaction of "contingent liabilities." *See* Treas. Reg. § 1.401-2(b)(2). The specific formulation used by the Plan drafters mirrors the definition of "contingent liabilities" adopted by the IRS in a series of revenue rulings: "benefit credits accrued up to the time of termination." Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69; *accord, e.g.*, Rev. Rul. 53-33, pt. 3(d) 1953-1 C.B. 267, 271; *see also supra* n.3.

Thus, the two phrases construed by the court of appeals are not idiosyncratic terms invented by the drafters of the Mead Plan. Rather, as other courts of appeals have recognized when confronted with identical plan language, they are federal pension law terms of art originating in, and defined by, the relevant statutory and regulatory provisions. *See, e.g., Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1170 (11th Cir. 1988) (en banc); *International Union, UAW v. Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984) (per curiam).[6]

In fact, the "actuarial error" and "contingent liabilities" concepts are incorporated into virtually every pension plan nationwide. As noted above, the two leading organizations of pension plan actuaries, who work with terminating pension plans on a daily basis, wrote in their amicus brief on rehearing in the court below that "virtually all pension plans" incorporate such provisions. *See* AAA/ASPA Br. In Support of Rehearing at 9. Similarly, in urging rehearing, the PBGC noted that these provisions

[6] In light of "ERISA's broad[] purpose of ensuring uniform treatment of pension benefits throughout the country," *In re Moore*, 907 F.2d 1476, 1480 (4th Cir. 1990), courts typically construe plan provisions by reference to the ERISA and Code backdrop against which they were drafted. *See, e.g., Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74, 79 (6th Cir. 1987); *Chait v. Bernstein*, 835 F.2d 1017, 1023 (3d Cir. 1987); *Babb v. Olney Paint Co.*, 764 F.2d 240, 242 (4th Cir. 1985).

are "terms of art" with "established meaning . . . under the Code and ERISA." PBGC Br. In Support of Rehearing at 11 (App. 189a). In short, despite the court of appeals' lip service to the "terms of the Plan" (App. 11a), the decision below cannot fairly be characterized as resting only on plan language. Rather, it interprets basic federal pension law, and consequently, its pernicious effects will not be limited to the particular pension plan at issue in this case.

2. The Decision Below Conflicts With The Views Of The Responsible Administrative Agencies And Other Courts

The court of appeals' construction of these two ERISA and Code provisions incorporated in the Mead Plan is at odds with the views of the responsible administrative agencies, other courts of appeals, and the pension community as a whole. These direct conflicts over the proper interpretation of key provisions of federal pension law require review by this Court.

a. The decision below construes the Plan's reference to "actuarial error" to mean "a computational error resulting from inaccurate statistical assumptions." App. 12a. This misconstruction directly conflicts with the position of the responsible administrative agencies and other courts.

Both the PBGC and the IRS follow the longstanding regulatory definition of "actuarial error" as "the surplus arising because actual requirements differ from expected requirements." Treas. Reg. § 1.401-2(b)(1). IRS revenue rulings clarify that "actuarial error" need not involve any specific mistake in calculation, but rather is used simply to describe any surplus remaining after a plan has been terminated and its liabilities satisfied. The key revenue ruling spelling out the agency's definition, Revenue Ruling 83-52, provides that "[a]fter satisfaction of [fixed and contingent] liabilities, an employer may recover any remaining funds from the plan as sur-

plus resulting from actuarial error." Rev. Rul. 83-52, 1983-1 C.B. 87, 87 (App. 75a); *accord*, Rev. Rul. 85-6, 1985-1 C.B. 133, 134.[7] Thus, far from necessitating the type of "computational error" required by the decision below, the agencies use "actuarial error" as, in Judge Chapman's words, "short-hand for what is left over after all vested and contingent obligations created in the plan are satisfied." App. 24a.

Indeed, both the PBGC and the IRS applied this established definition of "actuarial error" to the termination of the Mead Plan and specifically authorized the reversion at issue in this case. The PBGC issued a "notice of sufficiency" approving Mead's proposed distribution of Plan assets—a distribution that explicitly included a reversion. *See* App. 157a-158a.[8] Similarly, the IRS sent Mead a favorable "determination letter," which constituted a ruling that "excess plan assets" may be returned to Mead. *See* App. 159a-160a. Notwithstanding this Court's admonition to "consider the views of the PBGC and the IRS" (App. 43a), the court of appeals rejected both the IRS's definition and the agencies' application of it to the facts of this case.

By contrast, when called upon to interpret the "actuarial error" concept incorporated in a tax-qualified pension plan, other courts of appeals have acknowledged the term's regulatory origin and construed it in light of the

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[7] PBGC regulations similarly provide that all "residual assets"—which are defined as "plan assets remaining after all liabilities . . . have been satisfied" (29 C.F.R. § 2618.2)—may revert to the employer. *See* 20 C.F.R. § 2618.30(a).

[8] The PBGC's notice of sufficiency expressly refers to information supplied by the Plan's administrator, which was provided to the PBGC and the IRS in an IRS Form 5310, the relevant portion of which was filed, with the court of appeals' approval (App. 66a-67a), as Exhibit C to Mead's reply memorandum in support of rehearing below. On that Form, the Plan administrator indicated that the Plan termination would involve a reversion.

established position of the agencies. As a result, there is a direct conflict among the courts of appeals.

In *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) (en banc), the Eleventh Circuit dealt with a plan provision that permitted reversion of any surplus existing "as a result of actuarial error." *Id.* at 1170. Noting that the plan "mirror[ed] the regulatory interpretation," the *Blessitt* court concluded that Treas. Reg. § 1.401-2 and the IRS revenue rulings set forth the appropriate definition of "actuarial error," and approved a reversion of assets even though no "computational error" of the type required by the decision below (App. 12a) had occurred. *See* 848 F.2d at 1170-71.

The Sixth Circuit followed precisely the same course in *International Union, UAW v. Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984). There, the pension plan authorized reversion of " 'any surplus attributable to actuarial error.' " *Id.* at 337 (quoting pension plan). Plan participants sought to prevent the employer from recouping "any remaining surplus funds" after termination of the plan. *Id.* at 336. Recognizing that "the definition of an 'actuarial error' is the real point upon which . . . entitlement [to the surplus] turns," the *Dyneer* court endorsed the "adopt[ion of] the Internal Revenue Service's most recent definition of an 'actuarial error.' " *Id.* at 337 (citing Rev. Rul. 83-52, 1983-1 C.B. 87). Accordingly, like the Eleventh Circuit, the Sixth Circuit approved a reversion to the employer even though no "computational error" had taken place. *Compare* App. 12a.[9]

The Courts of Appeals for the Third and the District of Columbia Circuits have similarly approved constructions of "actuarial error" that are consistent with the

[9] *See also Bryant v. International Fruit Prods. Co.*, 793 F.2d 118, 121 (6th Cir.) (adopting IRS definition of "actuarial error"), *cert. denied*, 479 U.S. 986 (1986).

agencies' position, but in conflict with the decision below. In both cases the courts of appeals affirmed without opinion decisions by district courts that allowed reversions without requiring that a "computational error" be made by an actuary. *See In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1131-32 (E.D. Pa. 1977) (permitting reversion of any surplus due to "erroneous actuarial computations"), *aff'd*, 582 F.2d 1273 (3d Cir. 1978); *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257, 261 (D.D.C. 1983) (same), *aff'd*, 729 F.2d 863 (D.C. Cir. 1984); *see also Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976, 983, 994 (D.N.J. 1991) (approving reversion of surplus assets in a plan with "erroneous actuarial computations" provision; citing Treas. Reg. § 1.401-2(b)(1)'s definition).[10]

b. The construction of "contingent liabilities" in the decision below creates an equally serious conflict. While the court below purported to rely on Treas. Reg. § 1.401-2(b)(2) to construe the Plan's incorporation of the "contingent liabilities" concept, it concluded that the Plan's language created a benefit upon plan termination: "[W]e think that Mead was obligated to pay the unreduced early retirement benefits because the Plan mandated the satisfaction of 'contingent rights accrued under the Plan.'" App. 13a.[11] In reaching this conclusion, the court of ap-

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[10] As AAA and ASPA noted in their brief in support of rehearing below, the court of appeals' interpretation of "actuarial error" is also inconsistent with the established understanding of that term within the pension community. *See* AAA/ASPA Br. In Support of Rehearing at 7-9; *see also* App. 10a (noting "actuarial profession's understadning of ERISA").

[11] The court of appeals' reasoning is circular, since it creates benefits out of language that refers only to benefits defined elsewhere in the plan. App. 13a. In addition, the court of appeals completely ignored the plan administrator's decision not to pay such benefits because the Plan's age and service conditions had not been met—a decision that should be granted deference under Article

peals brushed aside the views of the PBGC, the IRS, and the professional actuarial associations as though the Mead Plan had been written in a vacuum without reference to Code and ERISA rules. *See* App. 13a-15a. Inexplicably, the court of appeals read the IRS regulation with the benefit of only dictionary definitions of the word "contingent," and defined a "contingent liability" as any benefit that "the Plan was liable to pay . . . on a contingency." App. 13a.[12] This interpretation is completely at odds with the views of the PBGC, the IRS, and other federal courts, all of whom have recognized that a benefit becomes a plan "liability" only when the Plan's conditions for entitlement to it are satisfied.

The PBGC and the IRS have long construed Treas. Reg. § 1.401-2(b)(2) and the related provisions of ERISA and the Code—ERISA § 4044(d)(1)(A) and Code § 401(a)(2)—to exclude unearned benefits, including early retirement subsidies, from the "contingent liabilities" that must be satisfied on plan termination. Rather, the agencies' longstanding view is that "contingent liabilities" consist only of "the benefit credits accrued up to the time of termination." *See* Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274.[13] Since early retirement subsidies do not accrue

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XI, § 1(b)(ii) of the Plan (App. 111a), and under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (plan administrator's interpretation of the plan "will not be disturbed if reasonable").

[12] In turning only to the dictionary, the court below fell victim to "the not uncommon error of reading technical pension language as if it were ordinary English speech." *Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-09 (2d Cir. 1977); *see also, e.g., Wise v. Ruffin*, 914 F.2d 570, 575 n.5 (4th Cir. 1990) (same), *cert. denied*, 111 S.Ct. 1090 (1991); *United Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1297 (3d Cir. 1983) (same).

[13] *Accord*, Rev. Rul. 57-163, pt. 3(d), 1957-1 C.B. 128, 138; Rev. Rul. 61-157, pt. 3(d), 1961-2 C.B. 67, 79; Rev. Rul. 65-178, pt. 3(d), 1965-2 C.B. 94, 110; Rev. Rul. 69-421, pt. 3(d), 1969-1 C.B. 59, 69; Rev. Rul. 71-152, 1971-1 C.B. 126, 127; *see also* 29 C.F.R. §§ 2618.2, 2618-13-.15 (PBGC regulations on allocation of plan assets).

on a year-to-year basis, but become entitlements all at once when the plan's requirements are satisfied, subsidies for which those requirements have not been met are not "contingent liabilities" of a terminated plan. *See, e.g.*, App. 94a (Plan, Art. V, § 2(b)) (receipt of unreduced early retirement benefits is conditioned on retiring after reaching age 62 and having 30 years of service).

Both agencies expressly informed the court below of their positions. In its brief on remand, the PBGC flatly stated that "[u]nearned subsidized early retirement benefits are not among the liabilities included in section 4044(d)(1)(A) that must be paid before residual assets revert to the employer." PBGC Br. on Remand at 4. The PBGC went on to explain that "since its inception" the agency has "construed the 'liabilities' that must be satisfied under section 4044(d)(1)(A) to be coextensive with the benefits included in the six priority categories in section 4044(a)"—which include only benefits for which participants have met the conditions for entitlement under the plan, whether or not vested. *Id.* at 6-8. Similarly, as the Department of Justice explained, the view of the IRS is that "early retirement benefits [a]re not plan liabilities within the meaning of Section 401(a)(2) of the Code." App. 168a. These agency positions are fully congruent because, under Title IV of ERISA, the "benefit liabilities" of a plan consist of "the benefits of employees and their beneficiaries under the plan (within the meaning of section 401(a)(2) of the Internal Revenue Code of 1986)." ERISA § 4001(a)(16); *see also* PBGC Br. In Support of Rehearing 8 (App. 187a). Ignoring these agency views, the court of appeals ruled that unearned early retirement subsidies were "contingent rights accrued" that had to be satisfied. Accordingly, there can be no doubt that the decision below squarely conflicts with the governing positions of the responsible administrative agencies.

The decision below also conflicts with the holdings of other appellate courts. The Eleventh Circuit in *Blessitt* reviewed the "regulatory interpretations" and concluded that "[c]ontingent liabilities have never been interpreted to include benefits that had not yet accrued when a plan terminated." 848 F.2d at 1170. Because it ruled (*id.* at 1171) that "unaccrued benefit expectancies" do not constitute "contingent liabilities" under Code § 401(a)(2), the *Blessitt* court directly rejected the court below's view that benefit expectations constitute "contingent liabilities" for purposes of ERISA and the Code. App. 13a-15a.

Following *Blessitt*, the Fifth Circuit also has rejected a broad reading of "contingent liabilities." In *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990) (per curiam), the court "recognized that federal guidelines are clear that 'an employer must satisfy only the employees' *accrued* benefits under the plan—not benefits that would accrue in the future if the employees continued to work for the employer [or successor employer] after the plan terminates—before a reversion of residual assets is permitted.'" *Id.* at 1070 (quoting *Blessitt*, 848 F2.d at 1172; emphasis and alteration in original).

The Third Circuit has taken an identical approach. In *Nobers v. Crucible Inc. 1975 Salaried Retirement Plan*, Nos. 90-3463, 90-3540 (3d Cir. Jan. 29, 1991) (reprinted at App. 161a-166a), the court addressed the precise question at issue here. Placing heavy reliance on "the views espoused in the PBGC's amicus brief," the *Nobers* court held "that the employee's expectations of early retirement subsidies are not 'liabilities' within the meaning of § 4044(d)(1)(A)." App. 164a, 166a.

The purported attempt of the court below to sidestep the question remanded to it—whether unreduced early retirement subsidies constitute liabilities under ERISA § 4044(d)(1)—thus wholly fails. ERISA § 4044(d)(1)

liabilities are the same as "liabilities" under Code § 401 (a) (2),[14] so that, by holding (App. 14a) that the terms of the Mead Plan "conform to the plain meaning of the word 'contingent'" under the Code § 401(a)(2) regulation, the court of appeals necessarily held that unearned early retirement subsidies constitute liabilities under ERISA § 4044(d)(1). In so holding the Fourth Circuit stands alone. Having incorrectly treated "actuarial error" as if it were just a provision in the Mead Plan rather than a fundamental pension law provision with a settled meaning (App. 12a-13a), the court below compounded its error by asserting—inaccurately—that its view of the meaning of "contingent liabilities" was the one that "is specifically used under ERISA." App. 14a. These holdings squarely conflict with settled administrative agency positions and the holdings of other federal courts. They cannot be allowed to stand.

3. The Decision Below Creates Widespread Uncertainty And Calls Into Question Thousands Of Plan Terminations

The pension law terms at issue in this case are critical to any plan termination. No reversion of plan assets is permissible unless the surplus is the result of "actuarial error," and no surplus exists until all "contingent liabilities" have been satisfied. By giving these terms interpretations at odds with their established meanings, the decision below will have widespread and intolerable consequences that must be corrected and prevented by this Court.

First, the decision below creates a basis for reopening thousands of plan terminations in which billions of dollars have reverted to employers through use of the previously-accepted meanings of "actuarial error" and "contingent

[14] *See, e.g.*, ERISA § 4001(a)(16) (defining "benefit liabilities" under Title IV as equivalent to Code § 401(a)(2) liabilities); ERISA § 4041(b)(1)(D) (a "standard"—*i.e.*, voluntary—plan termination is permissible only if plan assets are sufficient to pay all "benefit liabilities").

liabilities." According to the PBGC, in the period from 1980 to 1989, approximately 2,041 plans with assets over $1 million terminated, resulting in distributions of over $26 billion to plan participants and reversions of over $20 billion to employers. *See* PBGC Br. on Remand at 4 n.2. Under the decision below, none of these reversions was proper unless the plan surpluses were caused by a "computational error." *See* App. 12a. The PBGC and the IRS, however, have never applied such a definition in approving prior plan terminations. *See* PBGC Br. In Support of Rehearing 9 (App. 188a). Accordingly, the court of appeals' new construction invites plan participants to reopen previously settled terminations and to claim entitlement to assets recouped by the employer. Under ERISA § 502, plan participants may bring suits in state or federal courts to recover benefits. Moreover, many of the terminations and reversions taking place during the 1980s remain subject to attack since a § 502 action generally is controlled by the forum state's statute of limitations for breach of a written contract (*e.g.*, *Fogerty v. Metropolitan Life Ins. Co.*, 850 F.2d 430 (8th Cir. 1988)), which may extend out as long as 15 years. *See, e.g.*, Ohio Rev. Code Ann. § 2305.06 (Anderson 1991).

To attempt now to revisit completed plan terminations that were approved by the PBGC and the IRS would seriously disrupt the stability of the nationwide pension system, a result in conflict with ERISA's concern for the "soundness and stability" of pension plans. ERISA § 2(a). Moreover, the stability of the PBGC, the agency that Congress has created to administer the plan termination insurance program, could be threatened. The PBGC is already burdened with a $1.9 billion deficit that could grow to $11.4 billion over the next ten years. Special Problems In Bankruptcy: Hearing Before the Courts & Admin. Prac. Subcomm. of the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 4 (1991) (statement of James B. Lockhart III, Executive Director, PBGC). By opening up potential new liabilities under ERISA

§ 4003(f), which subjects the PBGC to civil suits by any plan participant "adversely affected by any action of the corporation," the decision below could conceivably add to the liabilities of an already overburdened agency. Relying on § 4003(f) plan participants who did not receive unearned early retirement subsidies in plan terminations approved by the PBGC could seek to recover those benefits directly from the agency or to require it to initiate costly proceedings to recover reverted assets from sponsoring employers.

Second, the decision below creates confusion for *future* plan terminations. The two pension law provisions involved here are incorporated into virtually all tax-qualified pension plans. *See supra* p. 10. Given the court of appeals' new gloss on the meaning of these provisions, employers terminating pension plans must decide whether to follow previously settled law or the new approach articulated below. Should they, for example, recoup only surplus assets attributable to "computational errors" by their actuaries, or should they follow the agencies' approach and recoup all assets remaining after satisfaction of plan liabilities. Indeed, to comply with the conflicting decisions of the courts of appeals, an employer must pay two employees of identical age and work history radically different benefits if one happens to reside in South Carolina—in the Fourth Circuit—and the other resides across the border in Georgia—in the Eleventh Circuit. *Compare* App. 12a, *with Blessitt*, 848 F.2d at 1170-71.

Third, the decision below creates an irreconcilable conflict with the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"). In REA Congress created, for the first time, limited statutory protection for unreduced early retirement benefits, but only for participants who satisfy all of their plans' age, service, or other conditions. *See* Code § 411(d)(6)(B). Thus if REA applied to the respondents, they would have been entitled to a portion of the early retirement subsidies *only* if they

had remained in Mead's employ and retired after reaching age 62 with 30 years of service—which none of them has done. *See* App. 3a-4a, 12a.[15] Clearly Congress, which enacted REA "to improve the delivery of retirement benefits" (98 Stat. at 1426), did not think it was cutting back on pre-existing rights. Nor would Congress have troubled itself to pass much less generous legislation if relief of the kind the court below invented were really the law prior to REA.

Fourth, the decision below undermines the security of pension plans by equating plan funding with creation of obligations for those pension plans. According to the court of appeals, because Mead has "set aside" funds to pay unreduced early retirement benefits, it must now pay such benefits before taking a reversion.[16] Under Code § 412, however, Mead had broad latitude in selecting the actuarial methods and assumptions to be used in funding the Plan. The effect of the decision below therefore is to punish Mead for having chosen a generous funding method that led to a substantial surplus. Not only is this result unfair, it may also lead to a pension system that is less securely funded and thus poses a greater risk to the already strained resources of the PBGC; as the court warned in *Chait v. Bernstein*, 835 F.2d at 1027, "[a]n employer that knew that it was prohibited from recapturing the surplus might be tempted to underfund its plan—a result that would benefit no one."

Finally, the decision below interferes with administration of ERISA and the Code by the responsible agencies, the PBGC, and the IRS. The PBGC—which faces considerable financial exposure as a result of the decision

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[15] REA applies only to plan terminations adopted on or after July 30, 1984. *See* REA § 302, 98 Stat. at 1451-52.

[16] *See* App. 10a, 12a. This amounts to little more than a resurrection in yet another form of the benefits expectation theory that underlay the court of appeals' prior decision (App. 52a), and that otherwise has been laid to rest in the circuits that have addressed it. *See, e.g.*, *Blessitt*, 848 F.2d at 1175-76.

below (*see supra* pp. 25-26)—demonstrated its grave concern with the court of appeals' decision by taking the unusual step of filing an amicus brief in support of rehearing and warning that the decision "does violence" to established pension law concepts. *See* PBGC Br. In Support of Rehearing at 11 (App. 189a). This Court should grant certiorari to resolve the conflicts created by the decision below, to prevent further disruption in the administration of ERISA and the Code by the IRS and the PBGC, and to protect the PBGC and employers from a flood of litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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